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Supreme Court of the United States

OCTOBER TERM, 2004

GIL GARCETTI, *et al.*, *Petitioners*

v.

RICHARD CEBALLOS, *Respondent*

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of 49 state associations of school boards across the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia, and the U.S. Virgin Islands. NSBA also represents the nation's 95,000 school board members who, in turn, govern approximately 15,000 local school districts that serve more than 47 million public school students. NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for a reasonable balance between the legitimate First Amendment rights of public employees to speak out on matters of public concern, and the obligation of schools as public employers, to promote the efficiency of the educational system.

NSBA submits this brief to emphasize the significant adverse impact that the Ninth Circuit's decision, if left intact, would have on the operation of our nation's schools.

SUMMARY OF THE CASE

This case was brought by an assistant prosecutor in Los Angeles, Richard Ceballos, who as a result of his own investigation believed that a

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[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

sheriff had lied in an affidavit to obtain a search warrant. He wrote a memorandum outlining his beliefs and recommending that the case be dismissed. After a meeting involving the district attorney's office and the law enforcement agency, his supervisor took a different view of the case and instructed Ceballos to change the memorandum. The memorandum was then turned over to defense counsel, and Ceballos testified for the defense. The court found no reason to invalidate the warrant. Subsequently, Ceballos was demoted and received undesirable assignments. He sued his employer, the Los Angeles District Attorney, claiming retaliation for his speaking out on a matter of public concern. The district court ruled in favor of the employer, but the Ninth Circuit Court of Appeals reversed, holding that Ceballos's speech (in the memo) was protected by the First Amendment right of free expression, regardless of the fact that the speech was in fulfillment of his job duties.

SUMMARY OF THE ARGUMENT

The distinction this Court has drawn in its First Amendment jurisprudence between speech uttered as citizen and that expressed as a public employee should be applied to speech made in fulfillment of a public employee's job duties, even if the expression touches on a matter of public concern. In making this determination, this Court should eschew the Ninth Circuit's approach which makes the content of the speech the sole determining factor of whether the expression falls within the scope of First Amendment protection. *Amicus* urges this

Court to retain consideration of the context and form of expression in determining that speech made in pursuit of a public employee's job responsibilities is not entitled to the same constitutional protection as speech expressed as a citizen. This approach will not compromise any of the values underlying the First Amendment's free speech protection and will permit public schools to regulate the speech of their employees who are retained to carry out the schools' educational mission. This is particularly important for schools in implementing their policy decisions regarding curriculum. Schools should be able to discipline or terminate employees who refuse to execute their responsibilities in the manner prescribed by the school board without undue fear of First Amendment claims based on speech made in fulfilling the employees' job duties, that happens to implicate a matter of public concern.

ARGUMENT

I. The employee/citizen distinction drawn by this Court in *Pickering* and *Connick* is critical to reaching an appropriate balance between efficient operation of public schools and the First Amendment rights of school employees.

This Court's First Amendment jurisprudence on the free speech rights of public employees provides the core principles that should guide its decision in this case with respect to speech made pursuant to a public employee's job duties. In *Pickering v. Board of Educ. of Township H.S. Dist.*

205, 391 U.S. 563, 568 (1968), this Court held that the First Amendment requires "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In *City of San Diego v. Roe*, 125 S. Ct. 521 (2004), this Court further explained that: "*Pickering* did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices." *Id.* at 525, *citing Connick v. Myers*, 461 U.S. 138 (1982). The Court properly identified the interests of public employees in retaining their interests *as citizens* to speak on matters of public concern and the interest of the government in maintaining the efficient operation of its agencies.

In *Pickering,* a teacher was dismissed after writing a letter to a newspaper that was highly critical of the school board and certain administrators in connection with their handling of a bond issue and allocation of those funds "between the schools' educational and athletic programs." 391 U.S. at 566. The teacher challenged his termination, contending that his speech was protected under the First Amendment. This Court agreed, stating that: "teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy *as citizens* to comment on matters of public interest in connection with the operation of

the public schools in which they work." *Id.* at 568 (emphasis added).

Thus, *Pickering* established that where an employee speaks as a citizen that speech may fall within the scope of First Amendment protection. This Court contrasted that situation with one where the public employee is speaking in his or her role as a public employee:

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the teacher as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id.

In *Pickering,* this Court found that the teacher was speaking on his own time as a citizen and thus the speech was protected: "[I]n a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by the teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be." *Id.* at 574. In so concluding,

this Court established distinct parameters for First Amendment protection—public employees, by virtue of their employment, should not be deprived of First Amendment protection when the subject speech is expressed pursuant to the exercise of the rights of citizenship, as opposed to speech expressed in accordance with the responsibilities of public employment.

These parameters were reaffirmed fifteen years later in *Connick v. Myers*, 461 U.S. 138 (1982). In ruling against an assistant district attorney who had circulated a questionnaire among her co-workers, soliciting opinions on a variety of matters related to the work environment at her office, this Court noted again that the central inquiry involved balancing the public employer's legitimate interest in an efficient workplace environment against the public employee's interest in commenting on matters of public concern "as a citizen." *Id.* at 140. This Court stated:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter.
>
> * * *

> The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Connick, 461 U.S. at 143 *citing Pickering*, 391 U.S. at 568.

The *Connick* decision ultimately turned on this factor: "We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; ... ." *Id.* at 147 (citations omitted).[2]

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[2] Since *Pickering*, this Court has not wavered from the pronouncements regarding the importance of "citizen speech." *See Perry v. Sindermann*, 408 U.S. 593 (1972)(finding protected a public college professor's testimony before a state legislature); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)(finding protected a public school teacher's communication with a radio station regarding the school's dress code for teachers); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (finding protected a teacher's private remarks with a supervisor regarding the school district's allegedly racially discriminatory policies); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)(stating "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse...."); *United States v.*

What is apparent from these cases is that the role of the speaker as a citizen or employee is equally as important as the content of the speech when determining whether First Amendment protection should be afforded. The Ninth Circuit decision below errs by focusing solely on the content of the speech and giving no consideration to the role of its speaker. *Pickering* and *Connick* make clear that the First Amendment does not protect individuals who are speaking as *public employees* on matters that are personal in nature. For the reasons explained more fully below and in Petitioners' brief, *amicus* NSBA urges this Court to reach the same result with respect to public employee expression made in the course of fulfilling official job duties or functions. None of the principles underlying the First Amendment would be compromised by doing so, and public schools would be better able to fulfill their mission of educating our nation's children according to educational policies established by school boards accountable to the electorate.

National Treasury Employees Union, 513 U.S. 454, 465 (1995) (in holding unconstitutional the prohibition of government employees from receiving honoraria, this Court stated that the employees "seek compensation for their expressive activities in their capacity as citizens" and the speeches lack "relevance to their employment.").

II. The Ninth Circuit's ruling unreasonably interferes with the ability of public schools to control the speech of their employees who are tasked with fulfilling the schools' educational mission.

Public agencies are created by statutes to fulfill specific purposes. In the course of public employment, numerous decisions, both big and small, have to be made regarding what tasks should be accomplished and in what manner to fulfill the mission of the agency. For example, in a school district, someone must decide what classes to offer, what type of student behavior warrants discipline, how to implement a special education program, etc.. These decisions are typically made by the school board as the employer who then hires employees to carry out the board's decisions.

This Court has recognized that public employers need to be able to hire employees who are willing to fulfill the mission of the public employer in the manner which the public employer prescribes. In *Waters v. Churchill*, 511 U.S. 661, 675 (1994), the Court stated:

> [C]onstitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign. The restrictions discussed above are allowed not just because the speech interferes with the government's operation.

Speech by private people can do the same, but this does not allow the government to suppress it.

Rather, the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.

Lower courts have also considered whether an employee's speech reflects unwillingness to conform to the expectations of the employer in determining if speech is protected by the First Amendment. *See, e.g., Urofsky v. Gilmore III*, 216 F.3d 401, 409 (4th

Cir. 2000) ("It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their position in a specified way."); *Wales v. Board of Educ. of Cmty. Unit Sch. Dist. 300*, 120 F.3d 82 (7th Cir. 1997) ("A school is entitled to insist that its staff carry out the educational philosophy espoused by the elected school board and the principal the board appoints. A Montessori school need not employ teachers who hanker for stern discipline. A memorandum proclaiming support for a disfavored educational approach (removing or disciplining disruptive kids) may be useful to a school in determining how a teacher runs her classroom.").

The Ninth Circuit's ruling, which only looks at the content of the speech (*i.e.*, is the topic of the speech one of public concern) rather than the form, content, and context of speech, fails to consider any factors which could indicate whether the employee was truly acting as a citizen, interested in informing the public on a matter of importance, or an employee who disagrees with how he or she has been directed to do his or her job. In short, under the Ninth Circuit's ruling, public schools could be forced to endure an endless litany of complaints by disgruntled employees—and the likely poor performance that would accompany such complaints—or else risk claims of retaliation based on the First Amendment should the board take action against the vocal employee. Such a result would hamper a public employer's ability to carry

out its mission and is contrary to the precedent of this Court.

III. The ability of public school boards to control school curriculum would be significantly undermined if school employees receive First Amendment protection for speech about any matter of public concern uttered in a classroom.

A. Courts have long recognized the authority of schools to control the content of their curricula, including speech that bears the schools' imprimatur.

Nowhere is the effect of the Ninth Circuit's flawed analysis on a public employer's control of speech made on its behalf more troublesome than in the context of classroom speech by teachers. By adopting a *per se* rule that public employee speech on a matter of public concern is protected by the First Amendment, the ruling below arrogates control of the classroom and the curriculum from school boards to teachers.

Schools have been at the forefront of the public employee free speech debate since this Court's seminal decision in *Pickering*. This is not surprising since teachers are, by the very nature of their jobs, paid to speak. However, given the young, captive audience and the schools' educational mission, it is extremely important that school boards retain control over speech made to these impressionable students. For this reason, Justice Frankfurter noted

that curricular control was one of four "essential freedoms" of a public educational institution: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 263-264 (1957).

Recognizing the essential freedom of a school to determine for itself what may be taught in its classrooms, this Court has acknowledged on many occasions both the authority and the obligation of schools to control what is said and done under their auspices, both by students, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); and teachers, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983). Of particular concern to this Court is the power of school-sponsored speech not only to educate young students, but also to inculcate values and beliefs.

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions . . . (citations omitted) recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing

> more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

Lee v. Weisman, 505 U.S. 577, 592 (1992).

Because speech in schools holds such power to shape and influence young people's lives, this Court's precedent indicates that our nation's schools, as employers, have wide discretion to restrict teacher speech in the classroom because such speech will be perceived by students as bearing the imprimatur of the schools. "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern." *Adler v. Board of Educ.*, 342 U.S. 485, 493 (1952). Thus, it is crucial that schools have the authority to ensure that teachers impart appropriate information to students in a manner that does not depart from the established curriculum.

Recognizing these interests, this Court in *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260 (1988), acknowledged the broad authority school boards have to select curriculum and ensure that it is taught. In that case, this Court upheld a principal's decision to remove from a school-sponsored newspaper two stories about pregnancy and divorce. One of the reasons the principal disallowed publication of the articles was his belief that the articles' references to sexual activity and

birth control were inappropriate for the younger children in the school. This Court concluded that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.[3]

While *Hazelwood* concerned student speech, this Court indicated that the same principles that govern a school's ability to control student speech would also apply to employee speech that might be seen to bear the imprimatur of the school. "If the [school] facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." 484 U.S. at 267, *citing Perry Educ. Ass'n v. Perry Local Educ. Ass'n,* 460 U.S. at 46 n.7. Thus, school districts may control school-sponsored speech regardless of

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[3] Judicial deference to curricular decisions was also reiterated in *Board of Educ. v. Pico*, 457 U.S. 853 (1982), where this Court noted the great hesitancy with which courts should embroil themselves in the curriculum and classroom: "As this case is presented to us, it does not involve textbooks, or indeed any books that Island Trees students would be required to read. Respondents do not seek in this Court to impose limitations upon their school board's discretion to prescribe the curricula of the Island Trees schools. On the contrary, the only books at issue in this case are library books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there." *Id.* at 862.

whether it comes from the mouths of students publishing the school newspaper, or from teachers selecting the school play.

Numerous lower court decisions have held that the authority to choose the curriculum lies with the school board, not its employees. For example, in *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994), the court held a school district did not violate a biology teacher's Establishment Clause rights by making him teach evolution nor his free speech rights by ordering him to refrain from discussing his religious beliefs during instructional time and to tell any students who attempted to initiate such conversations with him to speak to their parents or clergy. In *Board of Educ. of Jefferson County Sch. Dist. R-1*, 960 P.2d 695 (Colo. 1998), a teacher was dismissed for showing the film *1900* (an R-rated film) without prior approval from the principal. The Colorado Supreme Court held that: (1) the policy requiring prior approval was related to a legitimate pedagogical concern; and (2) the teacher was not entitled to actual notice of the policy because the controversial content of the film, *i.e.*, violence, drug use, nudity, and sex acts, should have alerted the teacher to seek prior approval. *See also, Boring v. Buncombe,* 136 F.3d 364 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998). In *Newton v. Slye*, 116 F.Supp.2d 677 (W.D. Va. 2000), after a parent complained, a high school principal ordered an English teacher to remove from the outside of the classroom door a pamphlet containing a list and description of banned books. The principal informed the teacher that the pamphlet potentially compromised the school's current curriculum

promoting family values, character development, and abstaining from drug use. The court held that even assuming that the teacher's posting of the pamphlet on the classroom door was considered protected speech, the principal did not violate the teacher's free speech rights, because the pamphlet impeded the school district's countervailing interest in teaching a curriculum based on community values previously approved by the school board.

The Ninth Circuit's decision in this case ignores this long established precedent and effectively strips schools of the ability, as an employer, to control their employees' speech in the classroom—speech which is not only attributable to them but also is the primary means necessary to carry out their governmental function of educating children.

B. Classroom expression by teachers by its very nature bears the school's imprimatur and is quintessential employee speech that the First Amendment does not protect.

By creating a *per se* rule that all public employee speech that relates to a matter of public concern is automatically entitled to First Amendment protection, the Ninth Circuit's decision fails to look at the form, content, and context of the speech and to consider whether the employee was acting as a citizen when he or she spoke at school or was in fact carrying out the responsibilities of a teacher for which he or she is employed by the district. Such an outcome effectively cedes control of

the curriculum from the schools to individual teachers and gives them a constitutional right to define, at least in part, the school's curriculum, over the informed judgments of both school boards and parents.[4] Such a right, "in the context of a curricular activity could unduly constrain the ability of educators to educate." *Hazelwood*, 484 U.S. at 273 n. 6. In short, the Ninth Circuit's decision effectively holds that "the Federal Constitution compels . . . elected school officials to surrender control of the American public school system to [individual teachers' personal preferences]." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969)(Black, J. dissenting).

Such a result is contrary to this Court's rulings and would allow teachers to transform classrooms from places where planned and structured teaching takes place into free-for-all forums where teachers may expound with impunity on countless issues of public concern that have little or no relevance to the curriculum mandated by the school board. For example, these issues might include whether the district's discipline policy is effective, whether the school board is doing enough to ensure teacher and student safety, which candidate should be elected to the school board, etc.

[4] This result, coming as it does from the Ninth Circuit, is paradoxical as the Ninth Circuit has repeatedly noted that "the curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere." *See, e.g., Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002). Yet the Ninth Circuit's decision below has stripped the school of this authority and given it instead to school employees.

Allowing teachers to don the mantle of First Amendment protection and diverge in this manner from the established curriculum and espouse their views on any subject related to a matter of public concern would severely hamper a school's ability to fulfill its mission of educating students on the selected curriculum. It clearly illustrates why content cannot be the sole determinant of the protected status of public employee expression that occurs in the workplace. In the examples described above, if the context and form of expression are considered, it becomes obvious that such expression by a teacher would not warrant constitutional protection as speech by a citizen; the expression is uttered in a classroom during school hours in a form and manner virtually indistinguishable from the way in which a teacher would carry out his or her official responsibility to instruct students. In other words, the teacher's speech would be as an employee, not as a citizen.

In addition to protecting classroom speech that is irrelevant to the mandated curriculum, the Ninth Circuit's ruling would also permit teachers under the cloak of free speech protection to discuss in the classroom issues of public concern that are relevant to the curriculum but from a perspective with which the school district disagrees, thereby supplanting a school's policy choices with the teacher's own. For example, a health teacher assigned to teach sex education might object to a school district's abstinence-only approach. The school's choice of this curriculum is undoubtedly a subject of public concern. Under the Ninth Circuit's ruling, if the teacher expressed opposition to the

abstinence-only policy to students in class and then proceeded to teach about how to use contraceptives, the teacher could assert First Amendment protection if the district disciplined him or her for failing to follow the district's chosen curriculum. This example illustrates the problems that arise from focusing solely on the content of speech and failing to look at whether the speaker was acting as a citizen when he or she spoke. Again, if context and form are considered, then the distinctions are obvious between this scenario and one in which the same teacher were to express his or her concerns directly to a supervisor or to write a letter to the community newspaper describing his or her viewpoint about abstinence-only sex education.

Practically speaking, it is difficult to imagine a scenario when a public school teacher could be acting as "citizen" when discussing a matter of public concern with students in the classroom.[5] The importance of context and form cannot be gainsaid. Students, unlike school administrators, school board members, or the adult electorate, are not in a position to change or even necessarily influence curriculum choices. In other words, classroom speech by teachers to students about matters of public concern is unlikely to promote any of the purposes generally associated with granting public

[5] The scenarios in this brief can easily be contrasted with those in *Pickering* and *Givhan*. In those cases, the teachers were talking to an audience in a position to do something about the problem the teacher perceived. In *Pickering* the teacher wrote a letter to the editor about how the district was spending money when citizens were preparing to vote on a bond issue. In *Givhan* the teacher complained to the school principal about the racially discriminatory practices in the district and in the school where she was employed.

employees protection for speech on a matter of public concern, such as keeping the public informed, initiating or contributing to robust public debate, or causing an institutional change. This being true, speech made by a teacher in the classroom warrants no constitutional protection.

It is possible—even likely—that the speech in the examples above would not be constitutionally protected under the balancing test described in *Pickering* which considers the interests of the employee, "as a citizen, in commenting upon matters of public interest and the interest of the State, as employer, in promoting the efficiency of the public services it performs through it employees." But such cases should not even require courts to engage in the balancing test. When speaking in the capacity of a public employee carrying out his or her job duties, a teacher's speech does not become that of a citizen merely because its content happens to touch on a matter of public concern. When a teacher speaks in a classroom to his or her students during the school day, he or she is undoubtedly speaking in fulfillment of his or her employment responsibilities; it is speech in which any interests the teacher may have as a citizen are displaced by her obligations as a public employee. The First Amendment simply does not protect such expression.

IV. Failing to consider whether a teacher's speech about a matter of public concern was made while acting as a citizen is overly burdensome for school districts because every such statement could be the basis of a constitutional claim.

Numerous public employees, like teachers and other school employees, cannot carry out their job duties without engaging in speech at work. Virtually all of them will at some point in the course of doing their jobs discuss a matter of public concern. This means that if the Ninth Circuit's ruling remains intact, almost every school employee facing discipline or termination will be able to assert a First Amendment claim that this speech is in fact the basis for the adverse employment action, as long as the employee alleges a connection between the adverse action and the prior speech. In many cases, the trial court will find sufficient disputed facts (as to whether the subject speech was disruptive enough to justify the employment action in question) so that the claim cannot be resolved until trial. The difficulties that school districts and other public employers will face in having these claims dismissed on summary judgment will, in turn, inflate the settlement value in almost every case.

Public school employees may even be able to manufacture First Amendment claims when they see "the writing on the wall" that an adverse employment action is likely. Teachers are often

protected by state statutes[6] and collective bargaining agreements[7] that give teachers a right to continued

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[6] In almost all states, a combination of state statutory and case law grants tenure to teachers who have been teaching for two or three years. See Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 1998 (1998), *available at* http://www.ecs.org/clearinghouse/14/41/1441.htm; EDWIN BRIDGES, MANAGING THE INCOMPETENT TEACHER 2 (Education Resources Information Center 1990). This property right to continuous employment, which is protected by the Fourteenth Amendment of the Constitution, guarantees teachers significant substantive and procedural due process rights in the event of attempted dismissal. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In terms of substantive rights, local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions. *See* Education Commission of the States, *supra*; BRIDGES, *supra*. While these criteria vary by state, typical grounds for dismissal include incompetence, immorality, insubordination, and neglect of duty. *See id.* The procedural rights guaranteed by state statutes and case law likewise vary among jurisdictions. Generally, however, a tenured teacher is entitled to timely and adequate notice of the reasons for dismissal, a fair hearing with legal counsel before the school board, an opportunity to cross-examine witnesses, and an impartial decision based solely on the evidence presented. *See* BRIDGES, *supra*; David M. Pederson, Statutory Dismissal of School Employees, in TERMINATION OF SCHOOL EMPLOYEES: LEGAL ISSUES AND TECHNIQUES 10-1-10-2 (National School Boards Association 1997). Moreover, all states allow teachers to appeal the school board's decisions to some entity—a state court, a tenure commission, the state board of education, etc. *See* Education Commission of the States, *supra*. Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times. *See id.*

[7] Approximately two of three states have enacted collective bargaining statutes covering teachers and mandating that local school boards bargain with unions over the terms and conditions of employment. Collective bargaining agreements

employment except under extreme and narrow circumstances, which make discipline and termination difficult. Usually, public school teachers are summarily dismissed only in the most egregious cases. More often, problematic employees go through some form of progressive discipline before being terminated. Under the Ninth Circuit's ruling, a perceptive teacher who determines discipline or termination might be imminent could try to save his or her job by speaking about matters of public concern before an adverse employment action was taken and point to that speech as the reason for termination.

Even without the overly broad interpretation of public concern espoused by the Ninth Circuit, the problem of disgruntled teachers interjecting First Amendment issues into what are primarily personal disputes already occurs all too often. For example, Brian Vukadinovich, a public school teacher, has over the last 20 years made what are essentially personal disputes with his employers into First Amendment claims.[8] This has wasted a tremendous

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often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in state statutes. *See* Education Commission of the States, State Collective Bargaining Policies for Teachers (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm. Typically, these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures.

[8] *See Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988) (finding Mr. Vukadinovich's statements in the newspaper "attempting to articulate his private dissatisfaction with his termination [from a basketball coaching position] and the

amount of resources in various district courts, the Seventh Circuit, and indeed in this Court as well. The Ninth Circuit's analysis would simply exacerbate this problem and force courts to intervene in the operation of our nation's schools unnecessarily.

Determining whether an employee was speaking as a citizen or as an employee when speaking about matters of public concern will help courts and employers distinguish between employees who merit First Amendment protection (*i.e.*, those who are genuinely trying to inform the public about an important matter) and those who do not (*i.e.*, those who are trying to hide their inadequate work performance behind the cloak of the First Amendment). Without this determination, school districts and other public employers will be more reticent to take justified adverse action against a

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reasons given for it" was not a matter of public concern); *Vukadinovich v. Michigan City Area Sch.*, 978 F.2d 403 (7th Cir.), *cert. denied*, 510 U.S. 844 (1993) (finding that even if Mr. Vukadinovich's criticism of the school board for hiring a particular superintendent were constitutionally protected speech, his speech was not a factor at all in his termination; also finding that Mr. Vukadinovich could be ordered to stay away from school after he was terminated and had no First Amendment right to speak on matters of public concern at the school); *Vukadinovich v. North Newton Sch. Corp.*, 278 F.3d 693 (7th Cir.), *cert. denied*, 537 U.S. 876 (2002) (finding that even if Mr. Vukadinovich's accusations against the superintendent and school board were constitutionally protected, he could not prove that the school board's alleged reasons for terminating him, insubordination and neglect of duty, were pretextual when he was asked five times to comply with a directive, and refused to comply three times and only made half-hearted attempts to comply two times).

public employee for fear the employee may allege a First Amendment claim based on any of a number of statements the employee has made about matters of public concern. Employers who take their chances and discipline or terminate public employees may often be subjected to expensive settlements or costly and meritless litigation.

The Ninth Circuit's ruling only ensures that this result will occur more frequently by allowing every statement by a public employee about a matter of public concern to pass the first part of the *Pickering* analysis, thereby raising a cognizable First Amendment claim. Thus, every action taken by a school district against an employee could become a constitutional question. Determining whether the employee speech was made as an employee or as a citizen is a sufficient criterion for determining what statements should pass the first part of the *Pickering* analysis. Even if the cases described above would ultimately fail because either the employee could not prove the speech was a substantially motivating factor in the adverse employment action or the employer proves it would have reached the same decision anyway despite the speech, substantial amounts of time and money will be unnecessarily expended to resolve a claim which should not be protected as a matter of law at the outset.

CONCLUSION

The Ninth Circuit's decision erroneously ignores whether an employee is acting as a citizen when he or she speaks about a matter of public concern at work and looks only to the "content" of the speech with no consideration of the "context" and "form" of the expression. These latter factors are crucial to determining whether an individual is speaking as a public employee whose expression may be regulated by his employer without violating the First Amendment, or as a citizen whose speech may merit First Amendment protection under a *Pickering/Connick* analysis. These distinctions are especially important for public employers, such as public schools, whose very purpose and mission depend on their ability to control their employees' speech. For these reasons, *amicus* NSBA urges this Court to reverse.

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